

From: Kessler, David (USANYE)
Sent: Thursday, November 30, 2017 10:15 AM
To: Chan, Winston Y.
Cc: Brodsky, Reed; Denerstein, Mylan L.; Mastro, Randy M.; Apple Ebooks Trial:Dubin, J; Smith, Alixandra (USANYE) 12; Pitluck, David (USANYE)
Subject: RE: US v. Greebel

Winston --

Approximately 36 hours ago, your colleagues told the Court the following:

Similarly, we also understand that if we choose to put on a defense case-in-chief, that then the government will have an opportunity to put on a rebuttal case. We certainly agree that the same rules that we articulate in this letter would apply to any possible government rebuttal case. That is, **we have not insisted – nor could we** – that the government tell us already which witnesses it might call in rebuttal or which exhibits they might choose to put on. It was only today that the government informed us that they will identify any rebuttal expert witnesses in any rebuttal case—**the government has not and could not possibly respond to a defense case without hearing the testimony of the witnesses during any defense case.**

(Dkt. No. 457 p. 4 (emphasis added).) The language in bold is particularly applicable in this instance. We provided rebuttal expert disclosures far earlier than we are required to do and in as fulsome a manner as practicable at this point. As explained in our letter, you have not told us which experts you will call at trial and which previously disclosed opinions your experts will offer -- or whether you will attempt to offer any materially revised or new opinions. It is particularly important to note that all of the defendant's disclosed opinions were "subject to change" and/or based on "ongoing" analyses. And even setting aside whatever finalized disclosure you make, we do not know what any expert the defense calls will actually testify about. For example, Alan Johnson's testimony at the Daubert hearing differed in numerous, material, ways from his previously disclosed opinions.

If and when the defendant provides us with final expert opinions and the experts have testified, we will be better situated to provide more detail about the opinions and methodologies of any rebuttal experts the government has noticed. As we have provided you with ample notice of the identity and qualifications of possible rebuttal witnesses, we strongly believe there is nothing to raise to the Court, but if you do so, we will respond accordingly.

David

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From: Chan, Winston Y. [mailto:WChan@gibsondunn.com]
Sent: Wednesday, November 29, 2017 8:49 PM
To: Kessler, David (USANYE) <DKessler@usa.doj.gov>
Cc: Brodsky, Reed <RBrodsky@gibsondunn.com>; Denerstein, Mylan L. <MDenerstein@gibsondunn.com>; Mastro, Randy M. <RMastro@gibsondunn.com>; Apple Ebooks Trial:Dubin, J <jdubin@dubinconsulting.com>; Smith, Alixandra (USANYE) 12 <ASmith12@usa.doj.gov>; Pitluck, David (USANYE) <DPitluck@usa.doj.gov>
Subject: Re: US v. Greebel

David,

Thank you but these disclosures are woefully inadequate, not the least because of the utter lack of any information about these experts' actual opinions, or the bases and methodologies therefor and what materials/information the experts reviewed.

Please let us know by 10 am ET tomorrow whether you will commit to providing the missing information by noon ET Friday. Otherwise we will seek relief from the Court tomorrow.

Regards,
Winston

On Nov 28, 2017, at 8:02 PM, Kessler, David (USANYE) <David.Kessler@usdoj.gov> wrote:

Please see the attached letter.

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<Ltr re rebuttal expert disclosure FINAL.PDF>

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